IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO. 86 OF 2005

Maruti Vitthal Ganeshkar & ors. ... Appellants.
Versus.
Savita Sambhaji Mane & ors. ... Respondents.

Shri G.S.Godbole for the Appellants.

Smt.Sangeeta Shrotri-Vaidya for the Respondents Nos.1 to 4.

CORAM : ABHAY S. OKA, J.

DATED : 23rd March, 2005.

P.C.:

1. Heard Shri Godbole for the Appellants and Smt.Sangeeta Shrotri-Vaidya for the Respondents Nos.1 to 4.

2. The suit house admittedly belonged to one Rangubai Maruti Ganeshkar who died on 28th February 1947 leaving behind her daughter Smt.Babubai. Smt.Rangubai had two sisters by name Vrundavanibai and Indubai. Father of the present Appellants/Defendants was nephew of Smt.Babubai. The said Babubai died on 27th November 1963. At that time the dispute arose between the father of the Appellants on the one hand and Vrundavanibai on the other hand in respect of the suit property. Father of the Appellants filed a declaratory suit against Vrundavanibai and Indubai in which there was a prayer for possession in respect of part of the house property.

The said suit was defended by Vrundavanibai by placing reliance on a Will dated 25th January 1963 executed by Babubai. The suit filed by the father of the Appellants was decreed by the trial Court. In Appeal preferred by the said Vrundavanibai, decree passed in favour of the father of the Appellants was set aside. The father of the Appellants preferred Second Appeal in this Court which was allowed in the year 1977 and the Judgment and Decree passed in favour of the father of the Appellants was restored. A Special Leave Petition was filed against the decision in the Second Appeal. In the meanwhile the Appellants filed Civil Suits in the Small Causes Court, Pune, against four tenants for possession of the premises in their respective possession in the suit property. After having succeeded in the said suits the Appellants obtained possession of the premises from the tenants. In the year 1995 Special Leave Petition filed by Vrundavanibai against the decision of this Court in Second Appeal was allowed and the net result was that the suit filed by the Appellants' father was dismissed. The result of the Judgment of the Apex Court was that the Will of Babubai in favour of Vrundavanibai was established. The Apex Court delivered the Judgment on 10th July 1995. After the said Judgment, Vrundavanibai filed a suit against the Appellants for possession of the suit house. The said suit was filed on the basis of title. The said suit was contested by the Appellants. The trial Court decreed the suit. The

contest by the Appellants in the said suit was on the ground that the suit was barred by limitation. The trial Court held that the suit filed was not barred by limitation. An Appeal was preferred by the Appellants to the District Court which has been dismissed.

3. Shri Godbole the learned Counsel appearing for the Appellants submitted that Babubai died on 27th November 1963 and according to the case of Vrundavanibai she became owner of the property by virtue of the Will executed by Babubai. The father of the Appellants was in possession of part of the suit house even to the knowledge of Vrundavanibai. He submitted that the suit ought to have been filed within 12 years from the date of death of Babubai. He submitted that the father of the Appellants filed suit for declaration. However, Vrundavanibai did not file any suit. He submitted that though there may not be any specific plea of adverse possession raised by the Appellants in the written statement in the present suit, from the admitted facts it is crystal clear that the possession of the Appellants became adverse at least from the year 1979 when the Appellants obtained possession of the premises from the tenants on the basis of the decree passed by the Small Causes court. He criticized the finding recorded by the Appellate Court that the cause of action arose for filing the present suit only in the year 1995. He submitted that the only inference which could be

drawn from the admitted facts was that the Appellants have perfected their title by adverse possession.

4. I have considered the submisisons very carefully. It is not in dispute that the suit will be governed by Article 65 of the Limitation Act 1962. Article 65 provides for limitation of 12 years from the date on which possession of the Defendant becomes adverse. In so far as the plea of adverse possession is concerned, the same is based on facts. It must be pleaded and established that the possession of the Defendant was hostile to the knowledge of the owner. As stated earlier, admittedly the plea of adverse possession is not taken in the Written Statement. From the Judgment of the Appellate Court it appears that a submission was made that the suit is governed by Article 64. The Appellate Court rightly held that as the suit was on title Article 64 cannot apply. Therefore, the suit will be governed by Article 65. In a suit for possession which is governed by Article 65 based on title, it was for the Defendant to plead and establish that his possession has become adverse from a particular date and the suit is filed after expiry of 12 years from the date of his possession becoming adverse. In the absence of any specific plea raised by the Appellant to that effect in the Written Statement, it cannot be said that the bar of limitation is attracted. In fact it is an admitted position that plea of adverse possession was not

specifically taken in the Written Statement.

5. In the year 1977 this Court restored the decree for declaration of ownership in favour of the father of the Appellants and the said decree was set aside only in the year 1995 by the Apex Court and during the pendency of the Appeal in the Apex Court, the Appellants obtained possession of the premises from the tenants.

6. Once the title of the original Plaintiff Vrundavanibai was upheld by the order passed by the Apex Court in the year 1995 and the Appellants not having raised the plea of adverse possession, the Courts below were right in holding that the suit filed by the original Plaintiff is within limitation. No substantial question of law arises. The Second Appeal is dismissed with no order as to costs.

7. At this stage Shri Godbole submits that the execution of the decree for possession be stayed for a reasonable time. The said request is opposed by the learned Counsel appearing for the Respondents. Considering the facts and circumstances of the case, the decree for possession shall not be executed for a period of six weeks from today.

8. The parties to act on authenticated copy of the order.

Judge.